IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :
THE HONOURABLE MR.JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 21ST FEBRUARY 2007 / 2ND PHALGUNA 1928

SA.No. 872 of 1992(D)

AS.25/1989 of SUB COURT, PAYYANNUR
OS.254/1984 of MUNSIFF COURT, PAYYANNUR
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APPELLANTS: APPELLANTS- PLAINTIFFS
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1. POTHERA KARIYAT KALLIANI @ YESODA AMMA,
KADANNAPPALLI AMSOM DESOM, P.O. KADANNAPALLI
DIST, KANNUR.

2. -DO- DEVI AMMA, -DO- -DO-
3. -DO- MADHAVAN , -DO- DO-
4. -DO- VISALAKSHI, -DO- DO-
5. -DO- PAVITHRAN -DO- -DO-
6. -DO- MADHU -DO- -D0-
7. -DO- SASI, -DO- -DO-
8. -DO- SANTHOSH, S/O.DEVI AMMA (MINOR 16 YEARS) -D0- -D0-
9. -D0-SURESH, S/O.DEVI AMMA (MINOR 14 YEARS) -DO -D0-

(MINOR APPELLANTS 8 AND 9 THROUGH THEIR MOTHER AND NEXT FRIEND 2ND APPELLANT)

BY ADV. SMT.VIDHYA. A.C

RESPONDENTS:- RESPONDENTS-DEFENDANTS;-
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1. KINATTUNKARA PADINHARE VEETTIL THANKKAMMA
D/O.UNNICHARAMMA, KADANNAPPALLI AMSOM DESOM
P.O. KADANNAPPALLI, DIST. KANNUR.

2. THEMANAM VEETTIL SANKARANKUTTY MARAR,
S/O.LAKSHMI MARASSIAR, DO- D0-

3. CHENICHERI KULANGARETH MADHAVI AMMA, D/O.KUNHATHI
AMMA, -DO- -DO-

BY ADV. SRI.M.SASINDRAN FOR R1 & R3

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD
ON 21/ 2 /2007 THE COURT ON 21/02/2007 DELIVERED THE
FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

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S.A. NO.872 OF 1992

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Dated this the 21st day of February 2007

JUDGMENT

Plaintiffs in O.S.254/84 on the file of Munsiff Court, Payyannur are appellants. First appellant died subsequent to the filing of the appeal and appellants 2 to 6 were recorded as her legal heirs. Respondents are the defendants. Appellants instituted the suit seeking a decree for permanent prohibitory injunction restraining respondents from trespassing into the plaint schedule properties. Plaint schedule properties are two items of properties comprised in R.S.217/2B of Kadannappali Village of Kannur Taluk. Though originally plaint schedule properties were shown as having an extent of 16 ½ cents, it was subsequently got amended in accordance with Exts.C3 plan and C4 report submitted by the Commissioner showing the extent of item No.2 as 5 ¼ cents and 2½ cents and item No.2 as 3½ cents. According to appellants plaint

schedule property originally belonged to their tharwad and under Ext.A1 partition deed dated 23.12.1959 plaint schedule properties were set apart to the thavazhi of first appellant and her children as items Nos.3 to 5 of B schedule of Ext.A1 partition deed and while they have been in possession, there was an oral partition and later under Ext.A2 partition deed dated 2.7.84 appellants are in possession of the plaint schedule property. Their case is that plaint schedule properties are item Nos. 4 and 5 of `B' schedule allotted to them under Ext.A2 and respondents have no manner of right or possession to the plaint schedule properties and they are to be restrained by a decree for injunction. First respondent filed a written statement contending that plaint schedule properties are in her possession and it was originally in the possession of her husband Kunhiraman Nambiar as having obtained it from Kerala Sarvodaya Sangham under the Boodhanam movement in 1955 and thereafter her husband

purchased the jenm right as per order in O.A.24610/1976 of Payyannur Land Tribunal and purchase certificate was also obtained and thereafter it was gifted to her under Ext.A14 gift are dated 30-4-1981 and since then the properties were in her possession and appellants are not entitled to the decree sought for. After the amendment of the plaint, additional written statement was filed contending that property in her possession was also the properties in survey No.217/2B and R.S.256/1B2 and appellants are not entitled to get a decree in respect of the said property. Second respondent filed a written statement raising the same contentions as that of the first respondent. It was further contended that his father Kottile Vettil Sankaran obtained the property in 1955 from Kerala Sarvodaya Sangham and he purchased jenm right and obtained Ext.B6 purchase certificate also and appellants are not entitled to get a decree sought for. Third respondent filed a written statement raising

similar contentions and also contending that she obtained two acres of property including plaint schedule property from Kerala Sarvodaya Sangham and after getting jenm right, she assigned 25 cents to E.K. Bhargavan and the remaining 1 acre and 75 cents are in her possession and appellants are not entitled to the decree sought for. Learned Munsiff framed the necessary issues. On the evidence of third appellant as PW1 and third defendant as DW2 and Exts.A1 to A15, B1 to B15 and C1 to C4 learned Munsiff dismissed the suit holding that appellants failed to establish their possession of plaint schedule property. Appellants challenged the decree and judgment before Sub Court, Payyannur in A.S.25/89. Learned Sub Judge after reappreciation of evidence, confirmed the decree of the trial court and dismissed the appeal. It is challenged in this second appeal.

2. Second appeal was admitted formulating the following substantial question of law.

1) Is the finding of the First Appellate Court

that plaintiffs admitted right and possession of defendants over the plaint schedule properties by means of Boodhanam documents is correct and whether there was any such admission.

2) In the light of Exts.A1 and A2 and the evidence whether courts below were justified in not drawing an adverse inference against respondents for not producing their title deeds.

3) Whether the First Appellate Court exercised jurisdiction in deciding the appeal.

3. Learned counsel appearing for appellants and respondents were heard.

4. The argument of learned counsel appearing for appellants was that finding of the first Appellate Court is erroneous and appellants did not make any admission in the plaint that defendants are in possession of the plaint schedule property under Boodhanam movement and therefore the very basis of the finding of the first Appellate Court is unsustainable. It was also argued that Ext.A1 establish that from 1959 thavazhi of appellants

were in possession of plaint schedule properties and it was subsequently orally partitioned and divided under Ext.A2 in 1984 and the oral evidence of PW1 and Exts.A4 to A11 tax receipts produced by appellants establish that they have been in possession of the property and therefore findings of the courts below to the contrary is unsustainable and it was misappreciation of evidence warranting interference in exercise of the jurisdiction of this court under section 100 of C.P.C. It was also argued that according to respondents, plaint schedule properties are part of the properties obtained under Bhoodhan movement and though it was contended that they obtained properties from Kerala Sarvodaya Sangham in 1955 and later purchased jenm right from Land Tribunal and obtained purchase certificate, these documents were not produced and therefore courts below should have drawn adverse inference against the case of respondents. Learned counsel also argued that as per the written statement of first respondent

plaint schedule properties were in possession of her husband which was gifted under Ext.A14 and plaint schedule properties which are in survey No.217/2B are not included in Ext.A14 gift deed or in Ext.A15 mortgage deed executed by first respondent and therefore it is clear that respondents are not in possession of plaint schedule properties and these materials were not appreciated by courts below and hence the concurrent decree warrants interference.

5. Learned counsel appearing for respondents argued that title deeds of respondents could not be produced as they were destroyed by white ants which was explained before courts below and Ext.B3 to B6 tax receipt establish that they have been paying tax for the properties in survey No.217/2B and learned Munsiff and learned Sub Judge appreciated the evidence and entered a factual finding that appellants are not in possession of the property and that factual finding cannot be interfered with in exercise of the jurisdiction of

this court under section 100 of C.P.C and therefore the appeal is only to be dismissed.

6. Exts.A1 and A2 are the title deeds of appellants. Ext.A2 partition deed was executed less than two months prior to the institution of the suit. Exts.A1 and A2 by themselves will not establish possession. Even properties in the possession of tenants could be included in the partition deed and divided between landlords and by such inclusion it cannot be said that the properties are in the possession of appellants. True, Ext.A1 shows that as items 3 to 5 the properties in survey No.217/2B having an extent of 54 cents were set apart to the share of first appellant her son Narayanan Nambiar, daughters Kalliani Amma and Janaki Amma and their children in the female descendants. It is clear from Ext.A2 partition deed that the properties set apart to the share of the thavazhy of first appellant were divided among them as per Ext.A2. But the question is whether by the said partition deed, it could be

said that appellants are in possession of plaint schedule properties.

7. True, respondents did not produce their title deed. It is also true that there was no admission in the plaint that the plaint schedule properties are in the possession of defendants much less as per Boodhanam documents. On the otherhand, the very case of appellants was that they are in possession of plaint schedule properties. What the first Appellate Court meant by observing that appellants admitted that respondents are in possession of the property under the Boodhanam movement is only with regard to the possession of properties obtained by Kunhiraman Nambiar, the husband of first respondent under Bhoodhanam movement. Ext.A2 itself shows that boundary properties therein are referred to as Bhoodhanam properties. It is for that reason learned Sub Judge held that possession of properties by respondents under Bhoodhanam movement was admitted. Non-production of title

deed of respondents by itself is not a ground to hold that appellants are in possession of properties or respondents are not in possession of the properties.

8. Learned Munsiff after elaborately appreciating the evidence entered a factual finding that appellants did not establish their possession. When respondents by producing Exts B3 to B6 tax receipts establish payment of tax in respect of properties comprised in R.S.217/2B, for the reason that R.S.217/2B is not included in Ext.A14 or A15, it cannot be said that respondents are not in possession of the property. Learned Munsiff on the evidence found that appellants are not in possession of the plaint schedule property. Learned Sub Judge after reappreciation of evidence also confirmed that factual finding. In exercise of the jurisdiction of this court under section 100 of C.P.C. that factual finding cannot be interfered. In the facts of the case, substantial questions of law raised by appellants, do not

arise and appellants are not entitled to get a decree as sought for in the suit. The appeal is bereft of merits and is dismissed. It is made clear that as the suit is only for permanent prohibitory injunction and was decided only on the question of possession, dismissal of the suit will not bar appellants from claiming recovery of possession on the strength of title, if it is not barred by time and they have title.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006